STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2004
v	No. 242860 Oakland Circuit Court
RONALD LEE WEST, Defendant-Appellant.	LC Nos. 02-183903-FC 02-183904-FC

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced to three concurrent prison terms of ten to thirty years each. He appeals as of right. We affirm and remand for correction of the Sentencing Information Report.

Defendant first argues that the trial court erred by refusing to instruct the jury on the lesser offense of second-degree criminal sexual conduct, MCL 750.520c. We disagree. "When reviewing the propriety of a requested lesser included offense instruction, we first determine if the lesser offense is necessarily included in the greater charge, or if it is a cognate lesser included offense." *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997), quoting *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325 (1996). The trial court must instruct the jury on necessarily included lesser offenses. *Lemons*, *supra* at 254. "With regard to cognate offenses, however, the evidence must be 'reviewed to determine if it would support a conviction of the cognate offense.'" *Id.*, quoting *Bailey*, *supra* at 668. Second-degree criminal sexual conduct, which requires proof of sexual contact, is a cognate lesser offense of first-degree criminal sexual conduct, which requires proof of sexual penetration. *Lemons*, *supra* at 253-254.[1] Instruction on the lesser offense was required only if there was a dispute in the evidence that would support a conviction of that charge. *Id.* at 254.

A person is guilty of first-degree criminal sexual conduct if he engages in sexual penetration with another person, who is under thirteen years of age. MCL 750.520b(1)(a).

[1] If *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), applied here, this would end the analysis. However, as this case was not pending on appeal when *Cornell* was decided, it does not fall within the "limited retroactive effect of that precedent. *Cornell*, *supra* at 369.

"Sexual penetration" is defined to include cunnilingus. MCL 750.520a(o). Thus, by definition, "sexual penetration" encompasses cunnilingus. There was only one reasonable interpretation of the evidence in this case. The testimony indicated that the victim was subject to acts of cunnilingus. The victim described that defendant licked her vagina, and a police detective testified that defendant indicated that he performed "oral sex" on the victim. The evidence did not create a dispute over whether there was "sexual penetration," as defined by MCL 750.520a(o). The trial court properly declined to instruct the jury on the cognate lesser offense.

Defendant also challenges the trial court's denial of his motion to suppress the statements he made to the police on March 20, 2002. Defendant argues that his statements were not voluntary. "When reviewing a trial court's determination of the voluntariness of inculpatory statements, this Court must examine the entire record and make an independent determination." *People v Shipley*, 256 Mich App 367, 372; 662 NW2d 856 (2003). We will not, however, disturb the trial court's factual findings absent clear error, and we give deference to the trial court's assessment of the weight of the evidence and credibility of witnesses. *Id.* at 372-373, citing *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

Voluntariness is determined by examining the totality of all the circumstances surrounding a statement to determine if it was the product of an essentially free and unconstrained choice by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The list of factors to be considered includes

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334 (citations omitted).]

The absence or presence of any one factor is not conclusive on the issue of voluntariness. *Id.* "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.*

The record demonstrates that defendant was forty-two years old, had completed the ninth grade, and could read and write English, which was his only language. While defendant had no previous experience with the police, he admitted that he learned about his rights in a ninth-grade government class. Further, he was not subject to prolonged or repeated questioning and was not unduly detained before making his statement. Defendant was interviewed by two detectives who were wearing street clothes. This occurred in a small room at the police department and, including the time given to defendant to write his statement, it lasted no longer than one hour.

Defendant was thoroughly advised of his *Miranda*[2] rights, which were read aloud to him. Defendant also read the rights set forth in the advice of rights form. Sherry McKinney, one of the detectives who interviewed defendant, testified that defendant did not indicate that he had trouble understanding. Rather, he indicated that he understood his rights and that he did not want an attorney. It was undisputed that he initialed each right on the form and signed the form. He affirmatively indicated in writing that he understood each of the rights and that he would waive his right to remain silent and would answer questions. He agreed, in writing, that he did not want to talk to a lawyer before being questioned, and he additionally signed his name under the following statement: "I, Ronald West, voluntarily, without threats, duress, coercion, force, promises of immunity or reward having been made to me, agree to take part in this interview."

Defendant nevertheless disputed that he actually understood his rights. At the *Walker*[3] hearing, he testified that he did not understand the advice of rights and only understood "some things" in English. Moreover, he argued that his statement was not voluntary because the detectives told him about the statements made by other witnesses and instructed him to include those facts in his written statement. He assumed that if he did not write a statement, he would not be allowed to leave. Thus, in his written statement, he reiterated the version of events outlined by the police. Detective McKinney denied that defendant was told what to write. She indicated that, when the detectives interviewed defendant, they only knew of one instance of criminal sexual conduct. Defendant supplied information about other instances during the interview. The trial court concluded that Detective McKinney was more credible.

In addition, the evidence at the *Walker* hearing did not indicate that defendant was injured, intoxicated, drugged, or in ill-health when he gave his statement. While defendant testified that he consumed two, forty-ounce beers over the course of a couple of hours before his arrest, the arresting officers did not observe signs of intoxication and defendant, himself, admitted that he was not intoxicated when he was arrested. Moreover, the challenged statements were made several hours after his arrest, and defendant was not intoxicated at the time. Further, the evidence did not indicate that defendant was deprived of food, sleep or medical attention. He was provided with fresh coffee. He admitted that he was not physically abused or threatened and that, while the detectives were not friendly, they never raised their voices. In addition, no promises were made to defendant in exchange for his statement.

Reviewing the totality of the circumstances, and giving due deference to the trial court's credibility determinations, we do not conclude that the trial court clearly erred in finding that defendant's oral and written statements were voluntary. The totality of the circumstances do not support a finding that the statements were involuntary or the product of coercion or unfair police tactics. Thus, we affirm the trial court's ruling denying defendant's motion to suppress.

Defendant finally argues that he is entitled to have this case remanded for a proper computation of the scoring of the offense variables (OV) and, if necessary, for resentencing. We disagree. At sentencing, the trial court considered challenges to the Sentencing Information

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Report (SIR). It ruled that the SIR should have reflected a score of fifty points for OV 11 and zero points for OV 13. Both the prosecutor and defense counsel agreed. The total OV score was seventy points. Defense counsel subsequently acknowledged that the recommended minimum sentence range under the legislative guidelines was nine to fifteen years' imprisonment. Defendant was sentenced to a minimum term of ten years' imprisonment for each of his convictions. While the agreed to changes were not reflected on the actual SIR, this oversight does not require remand for rescoring or resentencing. Defendant has not identified any error that would result in a different scoring of the offense variables or a different calculation of the sentencing guidelines. Furthermore, his sentence is within the properly scored guidelines. MCL 769.34(10).

Instead, we remand for a clerical correction of the SIR to reflect the agreed-upon changes. We affirm and remand. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter